IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 13, Original

UNITED STATES OF AMERICA,
Plaintiff

v.

STATE OF TEXAS,
Defendant

DEFENDANT'S PETITION FOR REHEARING DIRECTED TO THE COURT'S AMENDED OPINION

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The State of Texas hereby petitions the Court for a rehearing of this cause and reconsideration of the majority opinion as amended.

PRELIMINARY STATEMENT

In its original opinion of June 5, 1950, the Court declined to give effect to, or hear evidence on, the meaning of the terms of the Annexation Agreement between the United States and Texas, one of which provided that "all the vacant and unappropriated lands lying within its limits" were to be retained by the State.

The reason given by the Court for its conclusion "that no such hearing is required in this case" was stated as follows: "We are of the view that the 'equal footing' clause of the Joint Resolution annexing Texas to the Union disposes of this phase of the controversy." The majority opinion referred to and quoted an "equal footing" clause contained in Section 3 of the Annexation Resolution of March 1, 1845.

In its petition for rehearing, Texas pointed out that Section 3 of the Annexation Resolution was an alternative plan which was different from the adopted Sections 1 and 2 as to lands, debts, and "equal footing," and that it was deliberately discarded in favor of Sections 1 and 2.[1] Thereupon, the Court, in its order of October 16, 1950, amended its opinion in four places so as to remove all references to the Annexation Resolution of March 1, 1845, as containing an "equal footing" clause and so as to refer instead to the subsequent formal Admission Resolution of December 29, 1845, the words of which were not submitted to or accepted by Texas.

By this action the Court, which had originally recognized that the basis of its decision should be the

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[1] The discarded Section 3 contemplated transfer of "the remaining Texan territory to the United States," assumption of Texas' public debt by the United States, and "admission on an equal footing with the existing states."

Sections 1 and 2, which were actually submitted to and accepted by Texas and which contain all the terms finally agreed upon, provided that Texas should retain "all the vacant and unappropriated lands lying within its limits," pay its own public debt, and "be admitted as one of the states of this Union." Significantly, the "equal footing" provision was omitted from Sections 1 and 2.

Annexation Agreement approved by both the United States and Texas, has shifted to a unilateral and purely formal act passed at a later date by the Congress of the United States and never agreed to by Texas.

These amendments to the opinion do not correct the basic errors originally complained of. Instead, they present further errors, equally serious, which require a rehearing of this cause.

ARGUMENT

I.

The Court has erred in basing its amended opinion on the formal Admission Act and in disregarding, and refusing to hear evidence on, the "proposals, conditions, and guarantees" of the Annexation Agreement, one of which provided that Texas shall "retain all the vacant and unappropriated lands lying within its limits."

The Court assumes that Texas, as a Republic, "had not only full sovereignty over the marginal sea but ownership of it, of the land underlying it, and of all the riches which it held." The Court adds, "In other words, we assume that it then had the *dominium* and *imperium* in and over this belt which the United States now claims." *United States v. Texas*, 339 U. S. 707, 717 (1950).

It remains undisputed in this case that under the laws of the Republic of Texas the ownership (*domin-*

ium) of the land and minerals within the marginal belt inside Texas' original boundaries was held by the Republic in trust for its people separately and apart from its paramount governmental powers (*imperium*) over the same area. These were separate and severable under Texas law and under then existing international law.[2]

It is undisputed that one nation may join another under an agreement by which it retains the ownership (*dominium* and economic use) of its marginal belt land and minerals and yet transfer its paramount governmental powers (national sovereignty) to the other nation. It is conceded by the Court that States may make special agreements with the Federal Government, relative to property within their borders.

It is undisputed that the United States and Texas entered into a specific agreement relative to future ownership of lands within the boundaries of Texas. It is undisputed that this entire agreement was contained in "proposals, conditions, and guarantees" tendered to Texas by the Congress of the United States in the *Joint Resolution for Annexing Texas to the United States*, dated March 1, 1845.[3]

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[2] The authorities are reviewed in defendant's original Petition for Rehearing, pp. 36-39, 42-49. See also Joint Memorandum in Support of Rehearing appended thereto at page 51 and signed by Joseph Walter Bingham, C. John Colombos, Gilbert Gidel, Manley O. Hudson, Charles Cheney Hyde, Hans Kelsen, William E. Masterson, Roscoe Pound, Stefan A. Riesenfeld, and Felipe Sanchez Roman, and concurred in by William W. Bishop, Jr.

[3] 5 Stat. 797. A copy appears in Texas' Brief, Appendix, pp. 58-60.

These specific terms were repeated in full and accepted by the Texas Congress on June 23, 1845, in a "*Resolution Giving Consent of the Existing Government to the Annexation of Texas to the United States* . . . on the terms, guarantees, and conditions" submitted by the United States.[4]

These specific terms were accepted by the people of Texas in convention assembled on July 4, 1845, through an ordinance assenting to "*the proposals, conditions, and guarantees*" tendered by the aforementioned resolution of the United States Congress.[5]

It is undisputed that all the "*proposals, conditions, and guarantees*" submitted by the United States Congress and accepted by Texas were contained in the documents heretofore mentioned. As admitted by plaintiff, "the specific terms" for the annexation of Texas were contained in Sections 1 and 2 of the resolution of March 1, 1845, which were quoted in full in Texas' acceptance resolution of June 23, 1845, and convention ordinance of July 4, 1845. There were no other "proposals, conditions, and guarantees" submitted by the United States Congress to Texas or accepted by Texas. Together, the aforesaid documents constituted the entire Annexation Agreement and contained the entire bargain entered into by the two independent nations.

It is undisputed that none of these three documents contained any cession or conveyance of the land and minerals in controversy from Texas to the

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[4] 2 Gammel's Laws of Texas 1225. A copy appears in Texas' Brief, Appendix, pp. 60-62.

[5] 2 Gammel's Laws of Texas 1228. A copy appears in Texas' Brief, Appendix, pp. 62-63.

United States, and none contained any agreement concerning "equal footing" or concerning the Court's theory of coalescence of Texas' property rights therein with national sovereignty. To the contrary, it is undisputed that these three documents each contained as part of the "proposals, conditions, and guarantees" the following specific agreement:

> "Second—said state, when admitted into the Union . . . *shall also retain all the vacant and unappropriated lands lying within its limits,* . . ."[6]

Counsel for Texas contended that this retention of "all the vacant and unappropriated lands lying within its limits" is conclusive against the claim of the United States, since it is one of the specific "proposals, conditions, and guarantees" agreed upon and the only specific term relating directly to the subject matter of this controversy. Texas further contended that the dispute raised by counsel for the United States as to whether this retention clause included the land in controversy should in no event be resolved against Texas without giving the State an opportunity to develop the evidence as to the meaning and intention of the parties and their 104 years of contemporary and subsequent construction.

It should be highly significant to the Court that counsel for the United States did not contend, either in their brief or oral argument, that the United

[6] The Court recognizes that the "limits" of the Republic of Texas at the time of this agreement included the land in controversy, the southern boundary reading: "beginning at the mouth of the Sabine river, and running west along the Gulf of Mexico three leagues from land, to the mouth of the Rio Grande." 339 U.S. at 713.

States was entitled to judgment if the parties intended the retention clause to cover the lands in controversy. In their brief, counsel for the United States were quite frank and fair in their assumption that Texas would be entitled to prevail if the retention clause was intended to include the lands herein sued for.[7]

In spite of this, the Court has completely disregarded the specific retention clause referring to lands. In denying Texas the right to introduce evidence and in deciding the case for the United States on the pleadings alone, the Court has given no effect whatever to the three documents which contain the "proposals, conditions, and guarantees" agreed upon by the United States and Texas.[8] The

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[7] In its brief under Point II, A, plaintiff devoted 30 pages of its 61 pages of argument to an attempt to show that this property was not intended to be included within the retention clause. The next 11 pages, Point II, B, were devoted to an argument that the transfer of this property is evidenced by the transfer of national sovereignty and by an alleged "equal footing." *However, the conclusion sought by this entire argument was frankly admitted to be proper only if the Court should find that the retention clause was inapplicable to this property.* In this connection plaintiff said: "We assume, throughout Point II, B, that the 'vacant and unappropriated lands' clause is inapplicable for any or all of the reasons given in Point II, A, *supra*." Plaintiff's Brief in Support of Motion for Judgment, p. 54, n. 28.

[8] These three documents which constitute the Annexation Agreement, as distinguished from the Admission Act, are:

1. The Annexation Resolution of March 1, 1845 enacted by the Congress of the United States.

2. The Resolution of the Congress of Texas, June 23, 1845, consenting to annexation upon the terms set out in the Annexation Resolution of March 1, 1845.

3. The Ordinance adopted by the people of Texas in convention assembled, July 4, 1845, assenting to annexation upon the terms set out in the Annexation Resolution of March 1, 1845.

Court's opinion, as amended by its order of October 16, 1950, contains no reference to any of the three documents which constitute the agreement, except in its preliminary statement of the contentions of the parties.

No word, phrase, term, or condition of the Annexation Resolution is relied upon or referred to by the Court as bearing upon or influencing its decision. Instead, the Court bases its amended opinion entirely upon an "equal footing" clause contained in a fourth document, which was a separate and subsequent unilateral Act of the United States Congress formally admitting Texas into the Union.[9] This Act, passed more than six months after the "proposals, conditions, and guarantees" had been agreed upon by the resolutions of the United States Congress, the Texas Congress, and the Texas Convention, did not purport to change or add to the agreement theretofore made. As said by President Polk, it was passed as a "matter of course," a mere formality, to carry out what the United States Congress by the resolution of March 1, 1845, had already agreed to do.[10]

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[9] 9 Stat. 108. A copy appears in Texas' Brief, Appendix, pp. 63-64.

[10] In a letter to General Sam Houston, dated June 6, 1845, President Polk wrote:

> "If she [Texas] accepts unconditionally, the great measure of the re-union of the two countries will be placed beyond danger and *may be regarded as consummated, for the next session of Congress as a matter of course*, will redeem the National faith and admit her into our Union."

On June 15, 1845, President Polk wrote Andrew Donelson, United States chargé d'affaires, who was negotiating the agreement:

> ". . . the conventions of Texas should on the day they meet pass a general resolution accepting our terms of annexation. The moment they do this I shall regard Texas as a part of our Union. . . ."

Nothing in the unilateral Act of Admission could nullify that agreement. The "proposals, conditions, and guarantees" actually submitted to the Republic of Texas left no room for further negotiation. Under Sections 1 and 2, the Republic of Texas was given no option as to the basis of annexation. Texas was free only to accept or reject the named "proposals, conditions, and guarantees," within the time specified.

If Texas chose to accept the offer, the Republic *and* its people were required to go beyond the mere act of manifesting assent. Acceptance involved performance of acts whereby the Republic of Texas was transformed into the State of Texas. By Acts of the Texas Congress *and* adoption by the people of a state constitution, the compact was at once entered into and by Texas *performed*. Thenceforth the compact was not merely executory, it was executed. It remained only for the United States, by its Congress, to recognize the act of acceptance *and* performance as a *fait accompli*. The Republic of Texas and its people, having in this manner accepted the terms, conditions, and guarantees of annexation were by that act transformed into the State of Texas. It was too late then for them to turn back. And when the Congress of the United States by the Joint Resolution of December 29, 1845, recognized that fact, by the same token it perforce recognized also that the terms, conditions, and guarantees of annexation were those contained in the offer of March 1, 1845, no more and no less. Indeed, the Admission Act of December 29, 1845, in express terms stated that this was the basis of the annexation. The Congress had reserved no power to change it, and nothing that was

done at that time was effective to change it. Consequently, it is utterly wrong to turn the decision upon what are now interpreted as new terms added on December 29, 1845. If they were intended to import a new meaning, different from that previously agreed upon, Texas had no opportunity to assent to them and did not assent to them.

Far from altering or adding to the terms and conditions already agreed upon, this unilateral Act of Congress specifically recited that the admission of Texas was theretofore consented to by Congress "upon certain conditions specified in the first and second sections of said Joint Resolution [of March 1, 1845]" and that "the people of the said Republic of Texas . . . assented to and accepted the proposals, conditions, and guarantees contained in . . . said resolution." Nothing could be clearer from the words of the Admission Act of December 29, 1845, than that the United States was formally admitting Texas in accordance with the "proposals, conditions, and guarantees" theretofore agreed upon.

Therefore, it remains essential to a final and fair determination of this case to decide what the parties meant by the condition and guarantee in the Annexation Agreement that Texas was to retain "all the vacant and unappropriated lands lying within its limits." If the Court should hear the evidence and decide that the United States Congress and the Texas Congress meant and intended by this clause to include the lands in controversy the same as all other unsold lands, the Court would be compelled to deny plaintiff's motion for judgment.

It would be imputing a dishonest act to the United States Congress of 1845 to say that after agreeing in its Annexation Resolution that Texas retain *all* lands lying within its limits, both upland and submerged, it then tagged on an "equal footing" clause in its unilateral act of admission with the intent to take away from Texas 2,608,774 acres of those lands. Obviously, the formal Act of Admission was not intended to work this shift in ownership because it was never even submitted to Texas. Since "equal footing" formed no part of the "proposals, conditions, and guarantees" previously agreed upon by the United States and Texas, its inclusion in the formal Act by the United States alone could not mean that a transfer of Texas' ownership of these lands was thereby accomplished.

As hereinafter shown, Texas has accumulated an abundance of evidence which will convince this Court that the United States Congress did not intend any such effect as is now given by the Court to the "equal footing" clause in the formal Act of Admission, if the Court will but give defendant an opportunity to introduce the evidence.

Likewise, as heretofore insisted, Texas has a great amount of evidence which it believes would convince the Court that the parties intended the lands in controversy to be included within the specific retention of "all vacant and unappropriated lands lying within its limits." At least, Texas should be given the opportunity to present the evidence rather than have its case foreclosed by the harsh remedy of summary judgment on the pleadings alone.

Let us illustrate the point involved here with a hypothetical case. Suppose Canada agreed to become annexed to the United States under circumstances and documents exactly like those involved in the Texas annexation except that the retention clause in Canada's annexation agreement read:

> "Second—said state, when admitted into the Union .... shall also retain all vacant and unappropriated lands lying within its limits, including the lands beneath its marginal belt three leagues from shore."

After that agreement had been consummated by the two nations, could it be contended that a subsequent formal act admitting Canada to the Union "on an equal footing with the original States" would divest her of the marginal belt lands which it had been agreed that she should keep? The answer is obvious.

The only difference between the foregoing hypothetical case and the Texas case is that the Texas retention clause, although equally broad and inclusive, does not in terms explain that it is meant to include the marginal belt lands "within its limits." But Texas pleads and can show by evidence that the United States Congress and the Texas Congress intended the retention clause to include the marginal belt lands no less than if they had been specifically mentioned as being included therein. With such evidence before the Court, Texas' defense to this lawsuit would be as strong as Canada's in the hypothetical case above stated. Denial of the opportunity to lay such evidence before the Court amounts to denial

of the right to present a defense which would decide this case in its favor.

Here there is a dispute as to the meaning of the Texas retention clause simply because plaintiff has urged that it was not intended to cover the lands in controversy. Texas says that the clause was meant to be as inclusive as it was written and that it can show by diplomatic correspondence, usage, contemporary and subsequent construction, and other evidence that the parties intended it to include these lands.

This Court, in its majority opinion, clearly states the rule which should apply to this situation, as follows:

> "The Court in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of facts. *United States v. Texas*, 162 U. S. 1; *Kansas v. Colorado*, 185 U.S. 125, 145, 147; *Oklahoma v. Texas*, 253 U.S. 465, 471. If there were a dispute as to the meaning of documents and the answer was to be found in diplomatic correspondence, contemporary construction, usage, international law and the like, introduction of evidence and a full hearing would be essential." 339 U.S. at 715.

Yet the Court thus far has denied Texas the right to introduce evidence and a full hearing on the disputed meaning of the clause which could require a decision of this case in its favor.

The possibility of Texas' evidence convincing the Court that the parties meant for the retention clause

to cover these lands is apparent from the fact that Mr. Justice Reed said in his dissenting opinion, "I think it does include those lands. . . . At least we should permit evidence of its meaning." He was joined in this by Mr. Justice Minton. Mr. Justice Frankfurter wrote, "How that shift [of lands from Texas to the United States] came to pass remains for me a puzzle." Mr. Chief Justice Vinson said from the bench during oral argument:

> "But they say, 'You can keep your vacant and unappropriated lands to pay your debt. If there is anything left over, it is yours.' . . . And the rest of it, whatever it is, that is what is here, as to whether or not the land in the marginal sea is in the residue."[11]

From the evidence developed in the case of *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1948), this Court held that Congress' use of the term "public lands which are actually occupied by Indians and Eskimos" within the Alaskan territory was broad enough to include coastal waters "3,000 feet from the shore line at mean low tide." The intent of Congress was determined largely by evidence relating to the character and purpose of the reservation, importance of fisheries to the Alaskan natives, an administrative determination, and other evidence similar to that which Texas seeks to offer showing that its retention of lands covered the marginal belt area "lying within its limits."

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[11] Reporter's Transcript of Argument, *United States v. Texas*, pp. 26-27.

The State of Texas seeks here the same opportunity to present evidence as was afforded the Secretary of the Interior on behalf of the Indians and Eskimos in *Hynes v. Grimes Packing Co.*

It is respectfully urged that the Court erred in its amended opinion by giving controlling effect to a clause in the formal Admission Act and in thereby disregarding, and declining to hear evidence on, the meaning of the "proposals, conditions, and guarantees" of the Annexation Agreement, one of which was that Texas

> ". . . shall also retain all the vacant and unappropriated lands lying within its limits."

II.

Since there is a dispute as to the meaning and intent of the clause in the Admission Act upon which the Court's amended opinion is based, the Court has erred in refusing to hear evidence and in deciding the issue by summary judgment.

In addition to the right to introduce evidence as to the intention of the parties to the three documents which contain the terms of the Annexation Agreement, defendant is entitled to develop the evidence which will show that in using the words "equal footing" in the formal Admission Act the United States Congress did not mean or intend thereby that ownership of the lands in controversy should pass from

Texas to the United States or that it should coalesce with national sovereignty.

The State has raised both of the foregoing defenses by special affirmative pleading. In its first amended answer, after quoting from the three documents which constituted the Annexation Agreement and also from the formal Admission Act, Texas alleged:

> "By these acts on the part of the United States and the Republic of Texas, when construed, as they must be, in the light of the intention of the contracting parties, there was a binding agreement between the two independent sovereigns that upon annexation Texas would not cede to the United States any, but that the newly created State would retain all, of the lands, minerals, and other things lying beneath that part of the Gulf of Mexico within the original boundaries of the Republic. . . ."

Texas earnestly insists that it can prove by diplomatic correspondence, speeches, congressional records, contemporary and subsequent construction, usage, and other evidence the following:

a. That the United States Congress, in using the term "equal footing" in the formal Admission Act of December 29, 1845, intended it to apply only to political rights and considered ownership of marginal belt lands entirely separate and severable from paramount national political rights over the area.

b. That the United States Congress did not mean

or intend the "equal footing" clause in the formal Admission Act to accomplish a transfer of ownership of the property in controversy or a coalescence thereof with national sovereignty.

c., That the meaning of the term "equal footing" as intended by Congress in the Admission Act was not in conflict with, but in complete harmony with, the retention of these lands by Texas in accordance with the "proposals, conditions, and guarantees" of the Annexation Agreement theretofore consummated.

Texas, by its pleadings and by its brief, positively disputes the Court's interpretation of the meaning and intention, as well as the effect, of the use of the words "equal footing" in the formal Admission Act. Under the rule stated by this Court, quoted on page 13, *ante*, defendant should be permitted to introduce evidence in support of a contrary meaning which it affirmatively alleges to have been intended.

The majority opinion states that there is no need to take evidence to establish the meaning of "equal footing" which it applies to this case. The Court says that its interpretation must be made here "if 'equal footing' with the various States is to be achieved." Obviously, no evidence is necessary to establish what the Court presently understands and interprets the term to mean. However, defendant alleges and can prove that when the United States Congress used the term in 1845, it did not mean or intend "equal footing" to have the effect given it

by this Court with respect to the property in controversy. The meaning of the term as it was used in 1845 and what was intended to be achieved by its use then should be controlling in this case. The effect of the term should be determined in the light of what was then understood to be its meaning. *Strother v. Lucas*, 12 Pet. 410, 439, 446 (1838); *Rocca v. Thompson*, 223 U.S. 317, 331-32 (1912); *Ross v. McIntyre*, 140 U.S. 453, 475 (1891).

Plaintiff's brief can be searched from introduction to conclusion without finding statement or argument that Texas' defenses, if supported by proof, are invalid and unavailing as a matter of law. Under such circumstances, on plaintiff's motion for judgment on the pleadings, these defenses should have been resolved in favor of the defendant and the motion overruled in order that the evidence might be heard. *Clark v. Allen*, 331 U.S. 503, 516 (1947); *National Metropolitan Bank v. United States*, 323 U.S. 454, 456-457 (1945).

CONCLUSION

For the foregoing reasons, it is respectfully urged that this petition for rehearing and reconsideration of the majority opinion should be granted and that the majority opinion should be withdrawn and judgment rendered denying plaintiff's motion for judgment on the pleadings and granting defendant's mo-

tion for the appointment of a special master to hear the evidence.

Respectfully submitted,

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October 31, 1950

Certificate

The foregoing petition for rehearing is believed to be meritorious and is presented in good faith and not for delay.

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